92-1735

No. ___

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

BRETT ALAN BRINTON

and

WILLIAM JOHN BRINTON,

Petitioners,

vs.

UNITED STATES OF AMERICA

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

ROGER S. HANSON, ESQ.
1517 East 4th Street
Santa Ana, California 92701
(714) 953-0638

Attorney for Petitioners
Member of the Bar
Supreme Court of the
United States

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether, under the Fifth Amendment, a federal criminal defendant is deprived of due process of law by indictment and trial under a federal statute that is retroactively held to "legally define" a chemical compound different from its clearly established and recognized scientific and chemical meaning?

2. Whether, under the Sixth Amendment, a federal criminal defendant is deprived of being informed of the nature and cause of the accusation by indictment and trial under a federal statute that is retroactively held to "legally define" a chemical compound different from its clearly established scientific and chemical meaning?

3. Whether, under the Sixth Amendment, a federal criminal defendant is deprived of the guarantee of effective assistance of counsel for his defense where his technically trained counsel recognizes and believes that a chemical compound set forth in a federal statute is defined exactly like the recognized scientific and chemical meaning, and thus advises the criminal defendant that the government will not prove the charged allegations of the federal criminal indictment at a federal trial?

4. Whether the Congress of the United States can "legally define" a chemical compound to mean something other than its recognized scientific and chemical definition?

5. Whether the United States Code at 21 U.S.C. 841(b)(1)(A)(viii) does "legally define" the distinct chemical compound *methamphetamine* to mean 4 totally different

QUESTIONS PRESENTED – Continued

chemical compounds of different molecular weight, different solubilities, different melting points, different physical appearance and different odors?

6. Whether, if such be the fact, whether the statute involved is void for vagueness within the meaning of *Kolender v. Lawson*, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983), *Graymed v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) and *Boyce Motor Lines v. United States*, 342 U.S. 337, 340, 75 S.Ct. 329, 96 L.Ed.2d 367 (1952)?

7. Whether a federal district court can instruct a federal criminal jury that it can return a verdict of guilty on an offense for which a federal grand jury has not returned an indictment on, within the meaning of *Stirone v. United States* (1960) 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 and *United States v. Lopez-Martinez*, 725 F.2d 471, (9th Cir. 1984)?

8. Whether there is a gross conflict between the United States Circuit Courts and the U.S. 9th Circuit which requires the grant of the petition for Certiorari to resolve the Circuit Court conflict in the key issue of recognized "legal" and chemical differences between chemical compounds supporting indictments and convictions in federal criminal cases?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Authorities vi

Introduction 1

Opinion Below 2

Jurisdictional Grounds 2

United States Constitutional Provision and Statutes Involved 3

United States Code Sections Involved 4

Statement of the Case 5

Reasons for Granting Petition For Certiorari 9

Argument 10

I. THIS PETITION FOR CERTIORARI CREATES AN ISSUE OF BELIEVED FIRST IMPRESSION: WHETHER THE U.S. CONGRESS AND/OR A U.S. COURT OF APPEAL CAN CREATE A "LEGAL DEFINITION" FOR A WELL-RECOGNIZED ORGANIC CHEMICAL COMPOUND THAT DIFFERS FROM ITS RECOGNIZED AND ESTABLISHED CHEMICAL MEANING AND DEFINITION; IF SUCH BE THE CONCLUSION, PETITIONERS ASSERT THAT THEY HAVE BEEN DEPRIVED OF RIGHTS UNDER THE 5TH AND 6TH AMENDMENTS TO RIGHT TO NOTICE OF THE CHARGES AND EFFECTIVE ASSISTANCE OF COUNSEL IN PREPARING A DEFENSE TO THOSE CHARGES. CERTIORARI SHOULD BE GRANTED TO RESOLVE THIS UNIQUE ISSUE OF ALLEGED CONFLICT BETWEEN LAW AND UNDISPUTED SCIENCE AND ORGANIC CHEMISTRY. 10

TABLE OF CONTENTS – Continued

Page

II. THERE IS CREATED AN IRRECONCILABLE CONFLICT IN THE U.S. CIRCUIT COURTS BY THE INSTANT 9TH CIRCUIT PANEL MEMORANDUM, PURPORTING TO CREATE A "LEGAL DEFINITION" OF A CHEMICAL COMPOUND THAT DIFFERS FROM ITS CHEMICAL DEFINITION. CERTIORARI SHOULD BE GRANTED TO RESOLVE THIS CONFLICT IN THE U.S. CIRCUIT COURTS... 20

III. AS INTERPRETED BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, 18 U.S.C. 841 IS VOID FOR VAGUENESS AS RETROACTIVELY CREATING A "LEGAL DEFINITION" OF A CHEMICAL COMPOUND THAT DIFFERS FROM ITS WELL RECOGNIZED AND FIRMLY ESTABLISHED CHEMICAL AND SCIENTIFIC MEANING. THE INTERPRETATION BY THE U.S. 9TH CIRCUIT PANEL DISENABLES LEGAL PRACTITIONERS AND COUNSEL THAT ARE TRAINED IN CHEMISTRY FROM PROPERLY ADVISING THEIR CLIENTS AND PROPERLY DEFENDING THEM, WITHIN THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION..... 25

Conclusion 27

Appendix

(a) Opinion, United States Court of Appeals, Jan. 21, 1993..... A-1

(b) Order Denying Review by United States Court of Appeals, March 17, 1993..... B-1

TABLE OF CONTENTS – Continued

Page

(c) Order Staying Mandate To Allow Petition for Certiorari, U.S. Circuit Judge Wiggins, April 1, 1993.....C-1

(d) Chemical Space Structures & Merck Index Proof Of Difference In Indicted Compounds Vis-A-Vis Those Proven At Trial.....D-1

TABLE OF AUTHORITIES

Page

CASES

Boyce Motor Lines v. United States (1952) 342 U.S. 337 ..... ii, 26

Graymed v. City of Rockford (1972) 408 U.S. 104 ..... ii, 12, 25

In Re Winship 397 U.S. 358 ..... 7, 20

Kolender v. Lawson (1983) 461 U.S. 352 ..... ii, 12

Lanzetta v. New Jersey 306 U.S. 451 26

Stirone v. United States (1960) 361 U.S. 212 ... ii, 13, 15

United States v. Barnes 890 F.2d 545 (1st Cir. 1989) 22

United States v. Brown 859 F.2d 974 (D.C. Cir. 1988) 21, 23

United States v. House 939 F.2d 659 (8th Cir. 1991) 24

United States v. Leroy 944 F.2d 787 (10th Cir. 1991) 24

United States v. Levy 904 F.2d 1026 (6th Cir. 1990) 23

United States v. Lopez-Gil 965 F.2d 1124 (1st Cir. 1992) 22

United States v. Lopez-Martinez 725 F.2d 471 (9th Cir. 1984) ..... ii, 13, 15

United States v. Metcalf 898 F.2d 43 (5th Cir. 1990) 23

United States v. Michael 788 F.Supp 1 (D.D.C. Cir. 1992) 24

United States v. Pinto 905 F.2d 47 (4th Cir. 1990) 22

United States v. Reyes 782 F.Supp 609 (S.D. Fla. 1992) 24

TABLE OF AUTHORITIES - Continued

Page

United States v. Shaw and Wilson 936 F.2d 412 (9th Cir. 1991) ..... *passim*

United States v. Thomas 932 F.2d 1085 (5th Cir. 1991) 22, 23

United States v. Van Hawkins 899 F.2d 852 (9th Cir. 1990) 11, 17, 18, 21, 23

United States v. Vistoli-Ferroni 783 F.Supp. 1366 (S.D. Fla 1991) 24

United States v. Williams 876 F.2d 1521 (11th Cir. 1989) 24

UNITED STATES STATUTES

21 U.S.C. 841 ..... *passim*

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PETITION FOR WRIT OF CERTIORARI

To the Honorable William H. Rehnquist, Chief Justice of the United States, and to the Honorable Associate Justices of the United States Supreme Court:

Brett Alan Brinton and William John Brinton, petitioners, seek a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit from the memorandum filed January 21, 1993, rehearing and suggestion for rehearing en banc denied March 17, 1993.

On April 1, 1993 U.S. Circuit Judge Charles Wiggins stayed the issuance of the mandate in this case expressly to allow petitioners to seek Certiorari to this Honorable Court on the unique issue presented in this petition.

OPINION BELOW

The United States Court of Appeals for the Ninth Circuit filed its unpublished *Memorandum* on January 21, 1993. This appears as Appendix "A" to this petition.

On March 17, 1993 the U.S. Ninth Circuit denied a petition for rehearing and suggestion for rehearing en banc. A copy of that order appears as Appendix "B" to this petition.

On April 1, 1993 United States Circuit Judge Charles Wiggins issued an order staying the mandate in this case to specifically allow petitioners to seek Certiorari to this Honorable Court. A copy of that order appears at Appendix "C" to this petition.

JURISDICTIONAL GROUNDS

(i) The United States Court of Appeals for the Ninth Circuit affirmed the convictions of the petitioners by an unpublished *Memorandum* filed January 11, 1993. A copy of that memorandum appears at Appendix A-1.

(ii) The U.S. Ninth Circuit denied a petition for Rehearing/Suggestion for Rehearing En Bank on March 17, 1993. A copy of that Order appears at Appendix B-1.

(iii) On April 1, 1993 United States Circuit Judge Charles Wiggins stayed issuance of the mandate in this case to specifically allow petitioners to seek Certiorari from this Honorable Court. A copy of that Order appears at Appendix C-1.

(iv) Jurisdiction to review by Certiorari a decision of a United States Circuit Court in a criminal case is provided under 28 U.S.C. 1254.

U.S. CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT [VI.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously

ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

UNITED STATES CODE SECTIONS INVOLVED

§ 841. Prohibited acts A

[See main volume for text of (a)]

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving –

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

* * *

(viii) 100 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 1 kilogram or more of a mixture or substance containing a detectable amount of

methamphetamine, its salts, isomers, or salts of its isomers;

STATEMENT OF THE CASE

Petitioners Brinton were indicted upon and tried for various offenses involving possession of and manufacture of the specific chemical compound methamphetamine and the possession of the specific chemical compound ephedrine. 21 U.S.C. 841(a)(1); 21 U.S.C. 841(b)(1)(A)(ii)(II) and 841(b)(1)(A)(viii). Memorandum Slip Opinion, appendix A, pages A-3, A-4; IV, pages A-8, A-9, A-10.

Research and discovery provided by the United States before trial, and independent chemical analysis, revealed to petitioners and their counsel that neither methamphetamine nor ephedrine were present, were found, or were involved in the case.

Rather, very different chemical compounds were present and were involved in the case. These different and distinct chemical compounds were the compounds methamphetamine hydrochloride and ephedrine hydrochloride. Each are different from the indicted upon compounds and have

(i) different molecular weights;

(ii) different solubilities in such things as water or human blood, methamphetamine and ephedrine being insoluble, while methamphetamine hydrochloride and ephedrine hydrochloride being soluble;

(iii) different melting points;

(iv) different physical appearance, e.g., methamphetamine being an orange liquid at room temperature, while methamphetamine hydrochloride is a white powder at room temperature;

(v) different odors, e.g., methamphetamine having the typical odor possessed by compounds involving primary, secondary, or tertiary amine structure to ammonia, while methamphetamine hydrochloride is an odorless compound in its pure white powder form;

(vi) different atomic linkages, methamphetamine and ephedrine being distinct chemical compounds of totally covalent bonding, existing in discrete molecular form, while methamphetamine hydrochloride and ephedrine hydrochloride each exist in ionic space lattice form, there being no unique molecule making up the *ions* of these compounds. These two compounds, found in this case, and not the subject of the indictment, thus exist in a direct analogy to the endless 3 dimensional space lattice of the elementary ionic compound Sodium Chloride, i.e., ordinary table salt, Na^+ Cl^-.

Petitioners' trial counsel, and counsel on the appeal (Appendix A), and counsel on this petition, is technically trained, holding a Ph.D. in engineering, science and mathematics, and recognized that the indictment charged chemical compound possession and manufacture that would never be proven in the trial of petitioners. Indeed,

as admitted by the panel of the U.S. 9th Circuit in Appendix A, IV, pages A-8, A-9, A-10, the compounds methamphetamine and ephedrine were *not proven* in the jury trial, but instead the distinctly different compounds methamphetamine hydrochloride and ephedrine hydrochloride were established.

However, these compounds were not the basis for the Grand Jury Indictment, and petitioners, via their expert chemical witnesses and Professors of Organic Chemistry proved that the government totally failed to establish the elements of the charged indictment.

It is elementary that the government must establish each fact and each element of a federal crime beyond a reasonable doubt; *In Re Winship*, 397 U.S. 358, 364; if that requirement is not met, the criminal defendant is entitled to an acquittal and reversal of the conviction on appeal.

A panel of the United States Court of Appeals has, in this case, circumvented giving petitioners the relief to which they are entitled by claiming that the "legal definition" of the chemical compounds methamphetamine and ephedrine means something other than the chemical definition or true scientific meaning of these compounds, and, in effect, one chemical compound can be "legally defined" by the United States Congress to mean, and encompass, 4 other distinctly different compounds. *See* Appendix A, IV, pages A-8 through A-10.

It is said by that learned panel that persons scientifically and chemically trained, who understand these key differences, "bury their heads in legal sand" in failing to recognize that the United States Congress can magically transmogrify a well established, well named, and

chemically distinct compound into, and to mean, 4 distinctly different chemical compounds (See: Appendix A, page A-10).

No credit is given to the training of the attorney who knows the difference and could not, in his wildest dreams, forsee that such a federal statute could be interpreted fully contrary to science, chemistry, and truth, who advised petitioners that the government would not and could not prove the charges of this definite federal indictment.

It is here admitted that the government failed to prove the indicted charges, but was allowed to have the jury instructed that it may return convictions on non-indicted charges.

Petitioners suffered severe prejudice by rejecting plea bargains for substantially less sentences due to the misleading and faulty indictment.

It is a substantial right for a criminal defendant to defend only against the charges comprising the indictment, and not against unindicted charges; it is a substantial right of a criminal defendant to enter into a plea bargain for a lesser sanction, or for pleas dealing with some of the indicted charges here involving other matters than the possession of the named exact distinct compounds. As seen below, petitioners were deprived of these federally and constitutionally guaranteed rights by the retroactive and erroneous U.S. 9th Circuit panel opinion that purports to claim a "legal definition" of a chemical compound can be other than its chemical definition.

Petitioners claim that no such "legal definition" exists, and, indeed, the U.S. Code correctly and distinctly lists separately the 4 compounds involved.

Petitioners show below that the U.S. Circuit Courts, including, strangely enough, the U.S. 9th Circuit, recognize that the "legal definition" and the "chemical definition" of the exact parallel chemical compounds cocaine and cocaine hydrochloride are the same, and the U.S. Code lists cocaine and its salts, isomers, and salts of its isomers directly parallel and directly exactly as it lists methamphetamine, its salts, isomers, and salts of its isomers.

There is, therefore, a gross conflict in the circuits established by the instant aberration of a different U.S. 9th Circuit panel, requiring the Grant of Certiorari to establish uniformity in the U.S. Circuits.

REASONS FOR GRANTING CERTIORARI

1. In a case of first impression, to resolve the nationally important issue whether the U.S. Congress can "legally define" a chemical compound to mean something other than its recognized chemical and scientific meaning.

2. In a case of first impression, to resolve whether the U.S. Congress did in fact "legally define" a chemical compound to mean something other than its recognized chemical and scientific meaning, and, if it did not, to establish that the U.S. 9th Circuit committed error in its

dichotomization that a "legal definition" here differed from the well-established chemical meaning.

3. In view of the virtual uniform recognition by the U.S. Circuit Courts that "cocaine" is a totally different compound than "cocaine hydrochloride," to resolve a conflict in the U.S. Circuit Courts established by the instant opinion in the parallel compounds methamphetamine and methamphetamine hydrochloride, and ephedrine and ephedrine hydrochloride.

4. To resolve, in the federal system, whether a federal trial jury can be instructed that it can return a verdict of guilty on an offense not charged by the grand jury even though there is evidence that the uncharged offense was committed.

ARGUMENT I

THIS PETITION FOR CERTIORARI CREATES AN ISSUE OF BELIEVED FIRST IMPRESSION: WHETHER THE U.S. CONGRESS AND/OR A U.S. COURT OF APPEAL CAN CREATE A "LEGAL DEFINITION" FOR A WELL RECOGNIZED ORGANIC CHEMICAL COMPOUND THAT DIFFERS FROM ITS RECOGNIZED AND ESTABLISHED CHEMICAL MEANING AND DEFINITION; IF SUCH BE THE CONCLUSION, PETITIONERS ASSERT THAT THEY HAVE BEEN DEPRIVED OF RIGHTS UNDER THE 5TH AND 6TH AMENDMENTS TO RIGHT TO NOTICE OF THE CHARGES AND EFFECTIVE ASSISTANCE OF COUNSEL IN PREPARING A DEFENSE TO THOSE CHARGES. CERTIORARI SHOULD BE GRANTED TO RESOLVE THIS UNIQUE ISSUE OF ALLEGED CONFLICT BETWEEN LAW AND UNDISPUTED SCIENCE AND ORGANIC CHEMISTRY.

1. The Memorandum decision, attached in the appendix (Appendix "A") to this petition creates new and

different law in that one chemical compound of distinct molecular weight, solubility, melting point, and atomic chemical bonding, which is a liquid at room temperature, is "legally defined" to be itself *and* 3 other totally different chemical compounds, each of different molecular weight, solubility, melting point and atomic chemical bonding, which are solids at room temperature, while admitting that the "chemical difference" between and among these substances does exist; this decision is in dire conflict with the decisions of the Ninth Circuit, *United States v. Van Hawkins*, 899 F.2d 852 (9th Cir. 1990) (CJJ *Tang, Hall, Brunetti*) and *United States v. Shaw and Wilson*, 936 F.2d 412 (9th Cir. 1991) (CJJ Rymer, Canby, D.J. Levy), which treat the direct analogous problem in "cocaine, its salts, isomers, and salts of isomers," finding not only a *chemical difference*, but a *legal difference;* certiorari is necessary to *secure or maintain uniformity of decisions* in the 9th Circuit.

2. The proceeding and *memorandum* involves and creates at least 3 questions of exceptional importance:

> (a) Since 21 U.S.C. 841 (b) (1) (A) (ii) (II) lists "cocaine, its salts, optical and geometric isomers, and salts of isomers" and
>
> 21 U.S.C. 841(b)(1)(A)(viii) lists "methamphetamine, its salts, isomers, and salts of isomers," *does either of these listings "define," or "legally define" one distinct chemical compound,* i.e. *cocaine* or *methamphetamine, to be not only itself but 3 other distinctly different chemical compounds,* where each of the 4 separately listed chemical compounds have different
>
> (i) Molecular weights;

(ii) solubilities;

(iii) melting points;

(iv) physical appearances (some are liquid at room temperature, some are solid) (some have different colors);

(v) odors;

(vi) bonding between the atoms, i.e., either totally *covalent* bonding, or a combination of *covalent* and *ionic* bonding?

(b) Where, as here, the panel decision admits and recognizes a *chemical difference* between the compounds, can the U.S. Congress "legally define" chemical compounds to be identical in defiance of science, nature, and the Merck Index (the "Bible" of authority on chemical compounds)? See Appendix D.

(c) Does the panel memorandum create an *Unconstitutionally vague* statute in 21 U.S.C. 841 (b) (1) (A) and its subsections (ii) (II) and (viii) within the meaning of *Kolender v. Lawson*, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983) and *Graymed v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972), where the panel decision admits that those trained in science and chemistry (and even this defense attorney, trained in science and chemistry and law) recognize 4 *distinct chemical compounds* because of the "chemical definitions," and recognize 4 *separately listed* chemical compounds, in the statute, and where those learned individuals know that one distinctly different chemical compound could not be "defined" to be "itself" and, as well, 3 *other distinct compounds?*

3. The Memorandum opinion directly conflicts with existing opinions of *several* other Courts of Appeals for the circuits on the issue of *"legal definitions"* being different than *chemical definitions.*

Appellants were *indicted* for alleged offenses involving the distinct chemical compounds *methamphetamine* and *ephedrine.*

Within the provisions of the Ninth Circuit's decision, *United States v. Lopez-Martinez,* 725 F.2d 471, 473 (9th Cir. 1984),

> " . . . It is reversible error to instruct a trial jury that it can convict a defendant of an offense not charged by the grand jury, even though there is ample evidence that the uncharged offense was committed,"

which was bottomed on the key Supreme Court decision, *Stirone v. United States* (1960) 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252; appellants jury was instructed that they could return a verdict of guilty on the non-indicted and distinctly different chemical compounds, *methamphetamine hydrochloride* and *ephedrine hydrochloride.* Of course *methamphetamine hydrochloride* is a *salt* of *methamphetamine,* and is a *separately listed* chemical compound in 21 U.S.C. 841 (b) (1) (A) (viii) just as *cocaine hydrochloride,* a salt of *cocaine,* is a separately listed chemical compound in (ii) (II).

While recognizing and admitting that no methamphetamine nor ephedrine was produced in the evidence, and that the *"chemical definitions"* of these 4 compounds are clear, marked, and recognized, the instant panel makes the remarkable and epochal pronunciation

that the U.S. Congress has somehow magically *"defined"* each of these compounds to be something else.

The panel decision creates, of course, intellectual aberration out of a simple listing of 4 separate and distinctly different and admittedly prohibited chemical compounds, and within 3 typewritten pages, IV, pages A-8-A-10, re-writes science, organic chemistry and simple logic and reasoning in a thinly disguised effort to circumvent truth and reality. While congressional and judicial effort to combat and to thwart the nation's "drug problem" is today abounding, it goes beyond its perimeter in attempting, as here, to redefine science and chemistry, under a general "umbrella" that transmogrifys one distinct chemical compound into several others, purporting to make them congruent by the hitherto unheard of technique of "legal definition."

The fact that anyone learned in science and chemistry would not be forewarned of this rather shocking and amazing technique appears to be of no consequence. Those persons are said by the panel to "bury their head in legal sand."

Appellants submit the obvious and much simpler solution:

The U.S. Code makes no such *"legal definition"* as is fabricated by the *memorandum* decision; it lists, for both cocaine (ii) (II) and methamphetamine (viii) 4 separate, distinct, and admittedly prohibited chemical compounds; it surely does not, and could not, violate all scientific rules and "legally define" in a cookie-cutter manner, chemical identity among all of these separate and distinct compounds.

4. The treatment of this key constitutional issue by the panel memorandum. (IV, pages A-8-A-10).

Terming the constitutional issue an "argument" of "least persuasion," the panel admits that each of these named compounds are recognized by chemists to be fully distinct and different; this is, of course, because they exhibit at least 6 attributes of chemical incongruity:

(a) differing molecular weights;

(b) differing solubilities in water, or human blood;

(c) differing melting points;

(d) different appearance, e.g. *methamphetamine* is an organish liquid at room temperature, methamphetamine hydrochloride is a white solid at room temperature;

(e) different odor, the hydrochloride in its pure form being odorless, the liquid methamphetamine having the *odor* of ammonia-type compounds;

(f) different chemical bonding between the atoms (*covalent in the base compound* vs. *covalent-ionic* mixture in the hydrochloride.) (See Appendix D)

The simplistic panel resolution of the foregoing constitutional issue of indicting on an offense not proven at trial, and urging and obtaining a conviction on a non-indicted offense, in violation of *Stirone*, supra, and *U.S. v. Lopez-Martinez*, supra, 725 F.2d 471, 473 (9th Cir. 1984) is achieved by the panel asserting, tersely, without any authority, that

> "the *legal definitions* of methamphetamine and ephedrine differ from their *chemical definition* and include the salts, isomers, and salts of the isomers of each. 21 U.S.C. 821 (b) (1) (A) (viii) (1988),"

although the panel memorandum even incorrectly miscites the statute as "821" rather than "841".

Examination of the statute reveals no such "definition," and moreover reveals that *cocaine* and its salts, isomers, and salts of isomers are listed *exactly like* methamphetamine; neither *base compound* is "legally defined" contrary to its "chemical definition," nor could it; the statute lists, quite separately all 4 items as distinctly different chemical compounds.

The panel suggests that appellants are not "prejudiced" by their *successful* defense against the *indicted charges* but *conviction of* totally unindicted charges; that appellants are not "prejudiced" by their refusal to "plea bargain" for a much lesser sentence than the 10 years imposed because scientifically trained and chemically aware learned defense counsel knew the government could not prove (and did not prove) the *indicted crimes*, but could not anticipate that a reviewing Court could manufacture a "legal definition" that circumvented the field of science and chemistry. The panel suggests that those *trained* in chemistry, and those knowing the truth about the "chemical definition" are "burying their head in legal sand," apparently unable to forsee this unique and far-reaching appellate pronunciation that thwarts all scientific and chemical reasoning and truth.

THE NEED FOR GRANT OF CERTIORARI

The need to secure or maintain uniformity of decisions within the Ninth Circuit.

Appellants show in the appendix D to this petition, as was proven at trial, and is scientifically unchallenged, that there is an exact 1 to 1 correlation between the compounds "cocaine," i.e. *"cocaine base"*, or "rock cocaine" and *cocaine hydrochloride*, on one hand, and "methamphetamine" or *"methamphetamine base"*, and methamphetamine hydrochloride. The analogy and conversion from one chemical compound to the salt occurs because a + hydrogen ion, H+, attaches to a non-bonding electron at the *nitrogen atom*, present in all of these compounds.

The decisions of the Ninth Circuit, *United States v. Van Hawkins*, 899 F.2d 852 (9th Cir. 1990) (CJJ *Tang, Brunetti, Hall*) and *United States v. Shaw and Wilson*, 936 F.2d 412 (9th Cir. 1991) (CJJ Canby, Rymer, DJ Levi) recognize not only a *chemical difference in the base* vis-a-vis the *salt*, but they recognize a *legal definition* difference because of, in these opinions, the sentencing disparity for the *base* vis-a-vis the *salt* (*cocaine*, or *cocaine base* is sentenced, both by statute and guidelines at 100 times the penalty for the distribution of the same amount of *cocaine hydrochloride*). If a *"legal definition"* made *cocaine* equivalent to *cocaine hydrochloride*, or *isomers* of *cocaine*, or isomers of *cocaine hydrochloride*, as this panel suggests and holds for the direct parallel methamphetamine and its salts, isomers, and salts of its isomers, then the statutes and sentencing guidelines are plainly nonsensical, and illegal and void for vagueness. Such 9th Circuit panel decisions as *Van*

Hawkins and *Shaw-Wilson* make clear that the *chemical definitions* create the same *legal definitions* and the statutes and sentencing guidelines surely recognize these "legal definitions" as congruent with the "chemical definitions."

How can the instant panel memorandum square with the recognized panel decisions in *Van Hawkins,* supra, and *Shaw and Wilson,* supra?

Obviously it can not, and certiorari is mandatory to secure or maintain uniformity of decisions.

The certiorari consideration should not be stultified or truncated because the *memorandum* is *unpublished* and thus denies constitutional rights only to appellants. Indeed, such an amazing *memorandum* seemingly should be published if the Circuit Court believes in its judicial reasoning overcoming all recognized scientific principles!!!

In Appendix D to this petition, petitioners illustrate the atomic space structure of cocaine, cocaine hydrochloride, methamphetamine, and methamphetamine hydrochloride. It is there shown that the addition of a positive hydrogen ion at a situs of electronegativity on the single Nitrogen atom common to all of these compounds creates a new positive ion of relatively large molecular weight. This positive ion then exists in a 3-dimensional space lattice surrounded by negative chloride ions at 3 mutually perpendicular directions analogous to ordinary table salt, $Na^{+}Cl^{-}$, to form totally different chemical compounds of different molecular weight and physical characteristics. Reference: Any standard work on Organic Chemistry, e.g., Organic Chemistry, 5th Edition by Stanley Pine, Ph.D., Professor of

Chemistry, California State University at Los Angeles 1987 – McGraw Hill Book Company, N.Y., N.Y.

These comparative illustrations showing the 1 to 1 parallel between cocaine and its salt, cocaine hydrochloride, and methamphetamine and ephedrine, and their salts, methamphetamine hydrochloride and ephedrine hydrochloride, respectively, are key and critical to proof of the gross error of the instant U.S. 9th Circuit panel in this case for 2 reasons:

(a) The U.S. Code at 21 U.S.C. 841 lists cocaine and methamphetamine exactly the same, i.e., 4 separate compounds, they being the base compound itself, its salts, its isomers, and salts of its isomers;

(b) a multiplicity of United States Circuit Courts (see Argument III infra) have clearly held that the base compound cocaine is distinctly different from the commonest salt of that base compound, cocaine hydrochloride;

(c) At no time have any of these Circuit Courts asserted that a "legal definition" of cocaine *includes* the salts, the isomers, and salts of the isomers, nor could that be done with chemical and scientific accuracy;

(d) Since it can not be done for cocaine and its salts, isomers, and salts of isomers, it can not be done for the parallel base compounds methamphetamine and ephedrine.

The obvious truth is that Congress separately listed the 4 distinctly different chemical compounds, but here the United States indicted on compounds not possessed by the petitioners, and for which the petitioners and their

counsel correctly knew could not (and was not) proven in the trial.

Such a conviction violates the mandates of *In Re Winship,* 397 U.S. 358, 364 and must be reversed.

In view of the above issue of first impression involving a federal circuit court asserting that a "legal definition" of a well-recognized organic chemical compound replaces and nullifies its chemical and scientific definition, thus thwarting and disenabling the petitioners in the defense of the charged crime, certiorari should be granted.

ARGUMENT II

THERE IS CREATED AN IRRECONCILABLE CONFLICT IN THE U.S. CIRCUIT COURTS BY THE INSTANT 9TH CIRCUIT PANEL MEMORANDUM, PURPORTING TO CREATE A "LEGAL DEFINITION" OF A CHEMICAL COMPOUND THAT DIFFERS FROM ITS CHEMICAL DEFINITION. CERTIORARI SHOULD BE GRANTED TO RESOLVE THIS CONFLICT IN THE U.S. CIRCUIT COURTS.

This *Memorandum* conflicts with the opinion of other U.S. Circuit Courts on the "chemical" vs. "legal" definition concept.

In the major opinion *United States v. Shaw and Wilson,* 936 F.2d 412 (9th Cir. 1991) a panel of the Ninth Circuit clearly distinguished *both chemically* and *legally* between *cocaine* and *cocaine hydrochloride.* While it would appear evident that in stating "cocaine, its salts, its isomers and salts of isomers" as the 4 different prohibited chemical

compounds, the congress recognized that "cocaine" is not equivalent to "cocaine hydrochloride," the Shaw and Wilson panel made this evident at page 415:

> " . . . The holding of both these cases (i.e., *U.S. v. Brown*, 859 F.2d 974 (D.C. Cir. 1988) and *U.S. v. Van Hawkins*, 899 F.2d 852 (9th Cir. 1990)) is simply that 21 U.S.C. 841(b) is not unconstitutionally vague as long as cocaine base (i.e., cocaine) is defined so as to *exclude* cocaine salts . . . "

Since "methamphetamine, its salts, its isomers, and salts of isomers" are exactly the same chemical quantities as "cocaine, its salts, its isomers, and salts of isomers," it follows "that 21 U.S.C. 841(b) is not unconstitutionally vague as long as *methamphetamine* is defined so as to exclude methamphetamine salts . . . "

Hence the instant panel decision flies in the face of *U.S.A. v. Shaw and Wilson*, supra, when it attempts to "define" methamphetamine as "methamphetamine, its salts, its isomers, and salts of its isomers." It simply cannot be done, and appellants assert it wasn't done by the U.S. Congress.

Appellants here show that other U.S. Circuit Courts that have addressed the problem fully agree that there is both a *legal* and a *chemical* definition for such chemical compounds that distinguish the base compound from its salts, and the instant 9th Circuit panel Memorandum is an *anachronism* penned by the panel not facing the reality of science, chemistry, and all other U.S. Circuits studying the problem.

First Circuit: U.S. v. Lopez-Gil, 965 F.2d 1124 (1st Cir. 1992), although note that this opinion contains the continually confusing error that fails to recognize that *cocaine* is *cocaine base,* and is different from cocaine hydrochloride. This Court sloppily fails to recognize that *"cocaine"* is *cocaine base,* and the U.S. 9th circuit panel recognizes that cocaine chemically is $C_{17}H_{21}O_4N$ while cocaine hydrochloride is $C_{17}H_{21}O_4N$ HC1, which is snorted and is absorbable in blood or water. The *cocaine* referenced by $C_{17}H_{21}O_4N$ is, of course, *cocaine base,* or the "free base," said term coming from the base "free of" the salt. Street usage called "freebasing," i.e., smoking *cocaine,* presupposes the chemical form $C_{17}H_{21}O_4N$ which has a much lower melting point which allows the fumes to be driven off and inhaled. It is tragic that so many federal appellate courts continue to misuse these terms and hence promulgate very confusing and scientifically inaccurate opinions. See also *United States v. Barnes,* 890 F.2d 545 (1st Cir. 1989) (cocaine base, i.e., cocaine, chemically distinguishable from cocaine hydrochloride at 552); cocaine is water insoluble, the hydrochloride is soluble in water.

Fourth Circuit: United States v. Pinto, 905 F.2d 47 (4th Cir. 1990) (Substance with chemical formula $C_{17}H_{21}O_4N$ is "cocaine base," which is equivalent to "crack." This Court is referred to *Merck Index,* attached as Appendix D, pages 314, 315, which specifically shows *cocaine* to be $C_{17}H_{21}O_4N$, i.e., *Cocaine is Cocaine Base,* and does not, per *Shaw and Wilson,* 936 F.2d 412 (9th Cir. 1991) include *cocaine hydrochloride* as the panel erroneously believes.

Fifth Circuit: United States v. Thomas, 932 F.2d 1085 (5th Cir. 1991) (at 1090 the opinion contains the following erroneous statement: *"Cocaine base* is a *different drug* from

cocaine, see *United States v. Metcalf*, 898 F.2d 43, 46 (5th Cir. 1990); *U.S. v. Van Hawkins*, 899 F.2d 852, 854 (9th Cir. 1990) . . . *Thomas*, relying on the erroneous chemistry of *Van Hawkins*, which in turn relied on the erroneous chemistry of *Brown*, 859 F.2d 974 (D.C. Cir. 1988).

This Court should be using *"cocaine hydrochloride"* when it uses the term *"cocaine."*

Sixth Circuit: United States v. Levy, 904 F.2d 1026 (6th Cir. 1990), is a breath of fresh air for those trained in chemistry, and is one of the few circuits that properly recognize the *cocaine* = *cocaine base* vis-a-vis the *cocaine hydrochloride* dichotomy; from 1032:

> "In the Anti-Drug Abuse Act of 1983, Congress Amended 21 U.S.C. 841(b)(1)(B) to provide longer sentences for offenses involving mixtures weighing 500 grams or more that contain *cocaine hydrochloride* (powder) or mixtures weighing 5 grams or more that contain *cocaine base:*

And at 1033:

> "In broad terms, *cocaine base* and *cocaine hydrochloride* may be distinguished by their texture and chemical composition. *Cocaine hydrochloride* is water soluble formed in crystals or flakes, and is generally snorted by users. *Cocaine base* is not water soluble, is concentrated in rock-hard forms of various sizes, and is generally smoked."

Since, as said *ad nauseum*, there is a direct parallel between cocaine – cocaine HCl and methamphetamine – methamphetamine HCl, it is evident that *Levy* correctly evaluates the legal and chemical definitions, making them the same.

See also: *Eighth Circuit: United States v. House*, 939 F.2d 659, 664 (8th Cir. 1991). *Tenth Circuit: United States v. Le Roy*, 944 F.2d 787, 790 (10th Cir. 1991). *Eleventh Circuit: U.S. v. Reyes*, 782 F.Supp. 609, 611, 613 (S.D. Fla. 1992) (reviewed many circuits, including *U.S. v. Shaw and Wilson*, supra, and embraced the legal and chemical exact equivalent definitions; excellent discourse at page 611 as to differences between *cocaine*, i.e., *cocaine base* and *cocaine hydrochloride*. See also *U.S. v. Vistoli-Ferroni*, 783 F.Supp. 1366, 1367-1368 (S.D. Fla. 1991) and *U.S. v. Williams*, 876 F.2d 1521, 1525 (11th Cir. 1989). *D.C. Circuit: U.S. v. Michael*, 788 F.Supp. 1,3 (D.D.C. 1992).

Because of the conflict in the U.S. Circuit Courts, Certiorari should be granted to the United States Court of Appeals for the 9th Circuit.

As appellants-petitioners show elsewhere in this petition, and as shown in Appendix D, there is a direct, 1 to 1 parallel between cocaine and cocaine hydrochloride and methamphetamine and methamphetamine hydrochloride that requires parallel treatment in recognizing that there is no "legal definition" that varies from the chemical definition.

The instant U.S. 9th Circuit panel memorandum simply fails to recognize that the U.S. Code correctly lists 4 separate compounds for both cocaine and methamphetamine, and leading circuit courts treating the cocaine-cocaine hydrochloride dichotomy have *never* ruled that a "legal definition" exists that is different than the correct chemical definition.

The conflict being established, certiorari should and must be granted.

ARGUMENT III

AS INTERPRETED BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, 18 U.S.C. 841 IS VOID FOR VAGUENESS AS RETROACTIVELY CREATING A "LEGAL DEFINITION" OF A CHEMICAL COMPOUND THAT DIFFERS FROM ITS WELL RECOGNIZED AND FIRMLY ESTABLISHED CHEMICAL AND SCIENTIFIC MEANING. THE INTERPRETATION BY THE U.S. 9TH CIRCUIT PANEL DISENABLES LEGAL PRACTITIONERS AND COUNSEL THAT ARE TRAINED IN CHEMISTRY FROM PROPERLY ADVISING THEIR CLIENTS AND PROPERLY DEFENDING THEM, WITHIN THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION.

This Memorandum and appeal involves a question of exceptional importance, as set forth above. The questions, as stated, are many, including (i) whether Congress did "define" one compound to mean 3 or 4 others; (ii) whether, if it did, could it do so in defiance of science and chemistry; (iii) whether the statute is void for vagueness if recognized scientifically trained people, and those counselling criminal indictees awaiting trial, read into the statute only correct chemistry, and fail to foresee the unheard of "legal definition" concept that baffles and circumvents science.

As this Honorable Supreme Court has stated in *Graymed v. City of Rockford*, 408 U.S. 104, 108-109,

> It is a base principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give

> the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prohibited, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application . . .
>
> This Honorable Supreme Court has held that:
>
> "A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application *and the lawyer in defending one charged with its violation,*"

(*Boyce Motor Lines v. United States,* 342 U.S. 337, 340, 75 S.Ct. 329, 96 L.Ed.2d 367 (1952). See also, *Lanzetta v. New Jersey,* 306 U.S. 451, 456: (. . . It would be hard to hold that, in advance of judicial utterance upon the subject, *they were bound to understand* the challenged provision according to the language *later used by the Court . . .* ") *Boyce* and *Lanzetta* are especially appropriate, where, as here, scientifically trained defense counsel advised petitioners that the government could not (and did not) prove the indicted charges, and, as in *Lanzetta,* supra, counsel could not anticipate the *memorandum* that defied, circumvented, abrogated, and mutilated all scientific principles in its assertion of a "legal definition" that was contrary to the "chemical definition" of recognized chemical works as the "Merck Index." (See Appendix "D")

At trial, the government presented no evidence contrary to petitioners' expert, Dr. Stanley Pine, Ph.D., professor of organic chemistry, California State University at Los Angeles, and Dr. Steve Jones, Ph.D., both of whom established that the compounds charged in the indictment were totally different than the compounds introduced by the government at trial. Dr. Jones personally analyzed chemically the compounds in his analytical laboratory.

Because of the now-interpreted statute, it is clearly void for vagueness as applied.

Certiorari should be granted to establish this well-recognized constitutional principle in this, a case of first *scientific* impression.

CONCLUSION

This case should be granted certiorari because of the totally wrong finding by the panel that methamphetamine is "legally defined as" various other distinctly different compounds, a scientific and chemical impossibility. A "legal definition" can not go against and differ from the recognized chemical definition. The panel decision violates both cases from the U.S. 9th Circuit and a host of other Circuits, and raises such significant issues, in violation of *U.S. v. Lopez-Martinez*, 725 F.2d 471, 473

(9th Cir. 1984) that certiorari to the U.S. Ninth Circuit must be afforded.

Dated: 28 April, 1993.

Respectfully submitted,

/s/ Roger S. Hanson
ROGER S. HANSON
Counsel to Petitioners
Member of the Bar
United States Supreme Court

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, Cross-Appellant, vs. BRETT ALAN BRINTON, Defendant-Appellant, Cross-Appellee,	Nos. 90-50489, 91-50043 D.C. No. CR-89-0759-TJH-2
UNITED STATES OF AMERICA, Plaintiff-Appellee, Cross-Appellant, vs. WILLIAM JOHN BRINTON, Defendant-Appellant, Cross-Appellee.	Nos. 90-50488, 91-50045 D.C. No. CR-89-0759-TJH-1 MEMORANDUM*
	(Filed Jan 21, 1993)

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, District Judge, Presiding

Argued and Submitted September 18, 1992
Pasadena, California

Before: WIGGINS, KOZINSKI, KLEINFELD, Circuit Judges

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

OVERVIEW

William and Brett Brinton appeal their convictions for violations of 21 U.S.C. §§ 841(a)(1), 844, 846, & 858. Brett Brinton also appeals his separate convictions for violations of 21 U.S.C. §§ 841(a)(1) and 841(d). The government appeals the district court's departure from the Sentencing Guidelines.

The Brintons raise several issues on appeal, each of which will be treated separately. While the Brintons contend that the district court erred at nearly every turn throughout the course of the trial, after thorough review, we are convinced that the district court's only error was its complete disregard of the Sentencing Guidelines. Therefore, we affirm the convictions, vacate the sentences, and remand for resentencing.

FACTS

On March 6, 1989, an explosion occurred at an industrial complex located at 251 S. Mountain View in San Bernadino, California. At the time of the explosion, an eyewitness observed two white males wearing shorts and t-shirts dragging objects that were later revealed to contain methamphetamine from the exploded unit. The eyewitness also saw one of the individuals walk to a fence and throw a glass beaker over it. The police and fire department responded to the explosion. Officer Ken Boardman spoke to the eyewitness and recovered the glass beaker, detecting a brown substance on it and an odor consistent with methamphetamine. The officer then observed the Brintons, both wearing shorts, leave the exploded unit. The Brintons were detained and a search

warrant obtained to search the exploded unit. The search revealed that the explosion had originated in a clandestine drug laboratory and exposed several signed documents connecting the Brintons to the laboratory and its operation. Having indicated that they were co-owners of the exploded business, the Brintons were arrested in conjunction with the incident.

Based upon Detective Memmott's observations of the laboratory, the Brintons' statements as to their home address, prior knowledge of the Brintons' involvement in narcotics, and the expert opinion of Detective Memmott, the government obtained a warrant to search 3276 Miramonte Street in San Bernadino. During the course of this search, officers discovered 43 grams of methamphetamine, an explosive device, and a videotape with footage of the Brintons manufacturing a substance that appeared to be methamphetamine. The Brintons' mother also advised officers that William Brinton did not live at that location but at 3125 Cactus Circle with his girlfriend.

The police obtained a search warrant for the Cactus Circle residence and in a subsequent search discovered a jar of liquid containing methamphetamine, $1,000 cash, and various explosive devices and chemicals. The government also obtained search warrants for storage sheds rented by the Brintons. Searches of the sheds uncovered 1,300 pounds of ephedrine, a chemical often used in the manufacture of methamphetamine, and glassware used in the manufacture of methamphetamine.

Some months later, a grand jury returned an eight count indictment that charged the Brintons with conspiracy to manufacture methamphetamine in violation of 21

U.S.C. §§ 846 and 841(a)(1); endangering human life while manufacturing methamphetamine in violation of 21 U.S.C. § 858; manufacture of methamphetamine in violation of 21 U.S.C. § 841(a)(1); possession of methamphetamine with the intent to distribute in violation of 21 U.S.C. § 841(a)(1); manufacture of an explosive without license in violation of 18 U.S.C. § 842; and possession of ephedrine with the intent to manufacture methamphetamine in violation of 21 U.S.C. §§ 841(a) (1) and 841(d).

In August of 1990, a jury convicted the Brintons of conspiracy to manufacture methamphetamine, endangering human life while illegally manufacturing methamphetamine, manufacturing methamphetamine, and possession of methamphetamine with the intent to distribute. The jury also convicted Brett Brinton of possession of ephedrine with the intent to manufacture methamphetamine and of the lesser included offense of simple possession of 43 grams of methamphetamine.

DISCUSSION

The Brintons contend that the district court erred in denying them a *Franks* hearing. We disagree after considering the question de novo. *United States v. Perdomo*, 800 F.2d 916, 920 (9th Cir. 1986).

Not every challenge to an affidavit supporting the issuance of a search warrant requires a *Franks* hearing. A defendant must make allegations of deliberate falsehood accompanied by an offer of proof and must also show that the remaining content of the affidavit is insufficient to establish probable cause. *Franks v. Delaware*, 438 U.S.

154, 171 (1978). Here, the defendants have failed on both accounts.

First, the Brintons can point to no deliberate falsehood in the affidavits. They contend that the affiants did not know them, but the affiants never claimed that they knew the Brintons, only that they knew of them of them from their work as narcotics officers. Moreover, it is clear to us that the remaining content in the affidavits was sufficient to establish probable cause to search both residences and the storage shed.

It is undisputed that "[d]irect evidence that contraband or evidence is at particular location is not essential to establish probable cause to search the location." *United States v. Angulo-Lopez*, 791 F.2 1394, 1399 (9th Cir. 1986). Rather, the court "is entitled to draw reasonable inferences about where evidence is likely to be kept, based on the nature of the evidence and the type of offense. In the case of drug dealers, evidence is likely to be found where the dealers live." *Id.* (citations omitted). Furthermore, this court has "repeatedly found the opinions of experienced law enforcement agents highly important in making probable cause determinations." *United States v. Seybold*, 726 F.2d 502, 504 (9th Cir. 1984). Taken together these cases lead to the obvious conclusion that the police had probable cause to search the residences of both Brinton brothers as well as their storage sheds. We hold that the district court did not err in denying the Brintons a *Franks* hearing.

II

The Brintons also contend that their *Miranda* rights were violated when they were asked about, and divulged, their home addresses before receiving *Miranda* warnings. They argue that the questions about their home addresses constituted custodial interrogation and that their statements relating to their addresses and all evidence gathered thereby should have been suppressed. "Whether questioning constitutes interrogation presents a mixed question of law and fact which we review de novo, when as here, there is no factual dispute as to what questions were asked, whether *Miranda* warnings were given, or what answers were given." *United States v. Disla*, 805 F.2d 1340, 1347 (9th Cir. 1986).

"[Custodial questioning constitutes interrogation whenever, under all the circumstances involved in a given case, the questions are 'reasonably likely to elicit an incriminating response from the suspect.' " *United States v. Booth*, 669 F.2d 1231, 1237 (9th Cir. 1981) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)). This court has held that "[o]rdinarily, the routine gathering of background biographical data will not constitute interrogation." *Id.* at 1238. However, this court has also held that when police officers *know* that large quantities of drugs are contained within a residence, asking the suspect his address constitutes interrogation. *Disla*, 805 F.2d at 1347. Here, it is not clear that officers knew what, if anything, they would find at the Brintons' residence. Therefore, we hesitate to conclude that the questions asked constituted custodial interrogation in this case.

Fortunately, we need not decide that question because even if the questions constituted interrogation the Brintons could not exclude the "fruits" of that interrogation on *Miranda* grounds. The questions asked the Brintons were used only to establish probable cause for the search warrant affidavits. While "[s]tatements taken in violation of *Miranda* may not be used to prove the prosecution's case at trial[,] [s]uch evidence may . . . be used for other purposes, provided that its trustworthiness satisfies legal standards." *United States v. Lemon*, 550 F.2d 467, 473 (9th Cir. 1977); *accord United States v. Patterson*, 812 F.2d 1188, 1193 (9th Cir. 1987), *cert. denied*, 485 U.S. 922 (1988). Here, the statements weren't admitted at trial as incriminating evidence. Rather, they were used only to establish probable cause. The physical evidence was therefore recovered pursuant to valid search warrants, even if the questions constituted interrogation.

III.

The Brintons also contend that the search warrants for their homes and storage shed were defective because they lacked probable cause. We have addressed this contention above and are still convinced that there was probable cause to support the warrant in each instance. As a reviewing court, we give deference to the magistrate's determination of probable cause and preference to the validity of the warrant in close cases. *United States v. Hernandez*, 937 F.2d 1490, 1494 (9th Cir. 1991); *see also United States v. Schmidt*, 947 F.2d 362, 371 (9th Cir. 1991) (magistrate's determination of probable cause will not be reversed absent a finding of clear error).

The district court's finding that the search warrants were supported by probable cause is sustained by two important facts. First, the explosion of the Brintons' methamphetamine laboratory, and second, the detective's expert opinion that drug manufacturers often keep drugs, paraphernalia, and financial proceeds and records in their places of residence. The district court's conclusion is consistent with the previously cited decisions of this court holding that "the opinions of law enforcement agents [are] highly important in making probable cause determinations," *Seybold*, 726 F.2d at 504, and that "[i]n the case of drug dealers, evidence is likely to be found where the dealers live." *Angulo-Lopez*, 791 F.2d at 1399. The law in this circuit and the facts of this case compel our conclusion that the warrants were supported by probable cause.

IV.

By far the most persistent and least persuasive argument advanced by the Brintons is the contention that error was committed when the Brintons were charged with and convicted of the manufacture, manufacture with the intent to distribute, possession, and possession with the intent to distribute methamphetamine, and ephedrine and not methamphetamine hydrochloride and ephedrine hydrochloride[1] It is undisputed that at trial the evidence

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[1] We recognize that only Brett Brinton was convicted on counts seven and eight, which involved the ephedrine.

proved that the charge substances contained methamphetamine hydrochloride and ephedrine hydrochloride and not methamphetamine and ephedrine. It is little wonder that the government chooses not to dispute these chemical distinctions; after all, they are of no legal significance.

The Brintons were indicted for violating 21 U.S.C. § 841(a), which makes it "unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture distribute, or dispense, a controlled substance. . . . " The indictment specified that the controlled substances the Brintons were suspected of having possessed were methamphetamine and ephedrine. As already indicated, the evidence at trial proved that the substances that the Brintons actually manufactured and possessed were methamphetamine hydrochloride and ephedrine hydrochloride. The Brintons claim that this difference constitutes a factual variance between the indictment and the proof at trial. We disagree.

When a defendant alleges a factual variance between the indictment and the proof at trial, we must determine whether the defendant was prejudiced or surprised, and whether his substantial rights were affected. *See United States v. Morse*, 785 F.2d 771, 775 (9th Cir.) (reversal of conviction for variance required only if the substantial rights of the defendant were prejudiced), *cert denied*, 476 U.S. 1186, *and cert. denied* 479 U.S. 861 (1986); *United States v. Tarantino*, 846 F.2d 1384, 1391 (D.C. Cir. 1988) ("A variance between the allegations of the indictment and the proof at trial constitutes grounds for reversal only if

the appellant proves (1) that the evidence at trial established facts materially variant from those alleged in the indictment, and (2) that the variance caused substantial prejudice."), *cert. denied*, 488 U.S. 840, *and cert. denied*, 488 U.S. 867 (1988).

We are not convinced that there was any variance, much less a material one, between the indictment and the evidence and proof at trial. Furthermore, it is clear that the Brintons suffered no prejudice to any substantial right. The Brintons explain at length the chemical difference between methamphetamine and methamphetamine hydrochloride and ephedrine and ephedrine hydrochloride. They fail to recognize, however, that the legal definitions of methamphetamine and ephedrine differ from their chemical definitions and include the salts, isomers, and salts of the isomers of each. 21 U.S.C. § 821(b)(1)(A)(viii) (1988). Because both hydrochlorides are salts of the substances, they are included in the legal definition of methamphetamine and ephedrine.

Even assuming that there was some variance between the indictment and the evidence and proof at trial, the Brintons have failed to show how they were prejudiced and their substantial rights affected. The only possible prejudice to which the Brintons can point, the decision to defend against the charges and the refusal to plea bargain because of the scientific difference between methamphetamine, ephedrine and their hydrochlorides, was of their own creation. We will not permit defendants to bury their heads in legal sand and then claim prejudice. We find that the Brintons were neither prejudiced nor their substantial rights affected in any way.

V.

The Brintons also contend that the district court erred in instructing the jury. The Brintons challenge the legal sufficiency of the instructions. "Whether a jury instruction misstates elements of a statutory crime is a question of law we review de novo." *United States v. Johnson*, 956 F.2d 197, 199 (9th Cir. 1992).

All of the challenged instructions stated the law accurately and clearly. The district judge instructed the jurors that in order to convict under § 841(a) on counts three and four they had to find that the Brintons knew that they were manufacturing and possessing with the intent to distribute a controlled substance. *See, e.g. United States v. Ramirez-Ramirez*, 875 F.2d 772, 774-75 (9th Cir. 1989) (knowledge of precise controlled substance in defendant's possession not relevant; defendant need only be aware he has a controlled substance in his possession). For the same reason, the instruction on the lesser included possession offense stated the legal issues accurately and did not have to be withdrawn at the Brintons' request.

VI.

Finally, we reach the government's challenge of the Brintons' sentences. The government argues that the district court erred by "discarding" the Sentencing Guidelines in sentencing each of the Brinton brothers. We agree. It seems obvious that a district court may not disregard completely the Sentencing Guidelines when sentencing criminals. *See United States v. Brady*, 895 F.2d 538 (9th Cir. 1990).

We review any downward departures from the Sentencing Guidelines under the three prong *Lira-Barraza* test. First, we determine whether the district court identified adequately any aggravating or mitigating circumstance that was not considered by the Sentencing Commission and that would authorize a departure. *United States v. Lira-Barraza*, 941 F.2d 745, 746 (9th Cir. 1991) (*en banc*). Second, we review for clear error the factual findings supporting the existence of the identified circumstance. *Id.* Third, we determine whether the departure was reasonable. *Id.* at 747.

A sentencing court has an undeniable duty to state clearly the reasons for any departure from the Sentencing Guidelines. Unfortunately, we find that the district court has abrogated this clear duty in this case. The district court has not satisfied the first prong of the *Lira-Barraza* test; it has not identified any mitigating circumstance that was not considered by the Sentencing Commission that would justify such a drastic departure. Therefore, we vacate the sentences and remand this case to the district court for resentencing. We remind the district court that the Sentencing Guidelines are mandatory and may not be disregarded. *See United States v. Davern*, 970 F.2d 1490, 1492 (6th Cir. 1992) (finding that the Guidelines are a sentencing imperative). Any departure from a sentence compelled by the Sentencing Guidelines must be clearly justified by a good and substantial reason.

AFFIRMED IN PART, VACATED IN PART AND REMANDED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, Cross-Appellant, vs. BRETT ALAN BRINTON, Defendant-Appellant, Cross-Appellee,	Nos. 90-50489, 91-50043 D.C. No. CR-89-0759-TJH-2
UNITED STATES OF AMERICA, Plaintiff-Appellee, Cross-Appellant, vs. WILLIAM JOHN BRINTON, Defendant-Appellant, Cross-Appellee.	Nos. 90-50488, 91-50045 D.C. No. CR-89-0759-TJH-1 ORDER (Filed Mar. 17, 1993)

Before: WIGGINS, KOZINSKI, KLEINFELD, Circuit Judges

The panel has voted to deny appellants' petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a

vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellants' petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, Cross-Appellant, vs. BRETT ALAN BRINTON, Defendant-Appellant, Cross-Appellee,	Nos. 90-50489, 91-50043 D.C. No. CR-89-0759-TJH-2
UNITED STATES OF AMERICA, Plaintiff-Appellee, Cross-Appellant, vs. WILLIAM JOHN BRINTON, Defendant-Appellant, Cross-Appellee.	Nos. 90-50488, 91-50045 D.C. No. CR-89-0759-TJH-1 ORDER (Filed Apr. 1, 1993)

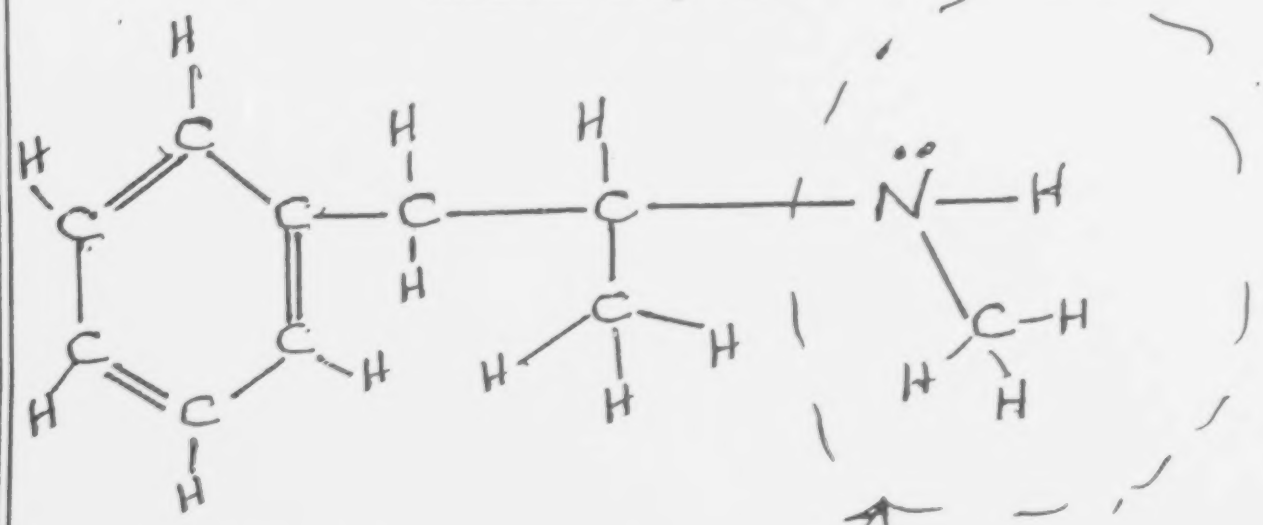
Before: WIGGINS, Circuit Judge

The motion of appellees, Brett Alan Brinton and William John Brinton, for a stay of mandate, pursuant to FRAP 41(b), is granted. Such stay shall continue for a period of 30 days, unless extended for cause shown.

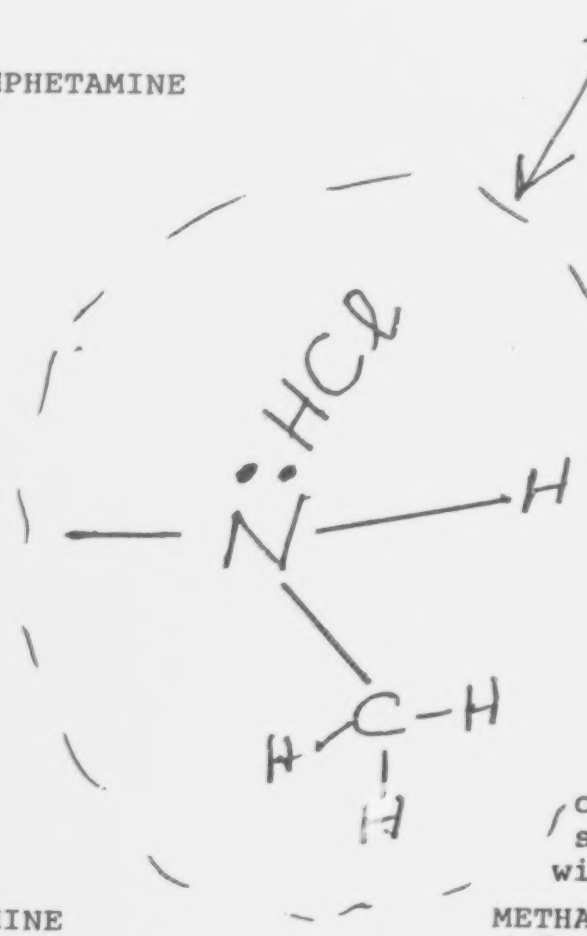
So ordered.

APPENDIX

Chemical Space Structure and Key Data For Relevant Distinct Chemical Compounds



METHAMPHETAMINE



Methamphetamine, showing formation of the distinct different compound methamphetamine hydrochloride by a hydrogen bond with hydrochloric acid at the situs of electronegativity on the Nitrogen atom, Nitrogen, with 5 electrons in its outer orbit, uses three to form bonds, leaving 2 exposed to attract the positive hydrogen nucleus, which has no orbiting electrons on its side opposite to the bond with the chlorine atom.

METHAMPHETAMINE

$C_{10}H_{15}N$

non-water soluble liquid at room temperature

molecular weight 149.24

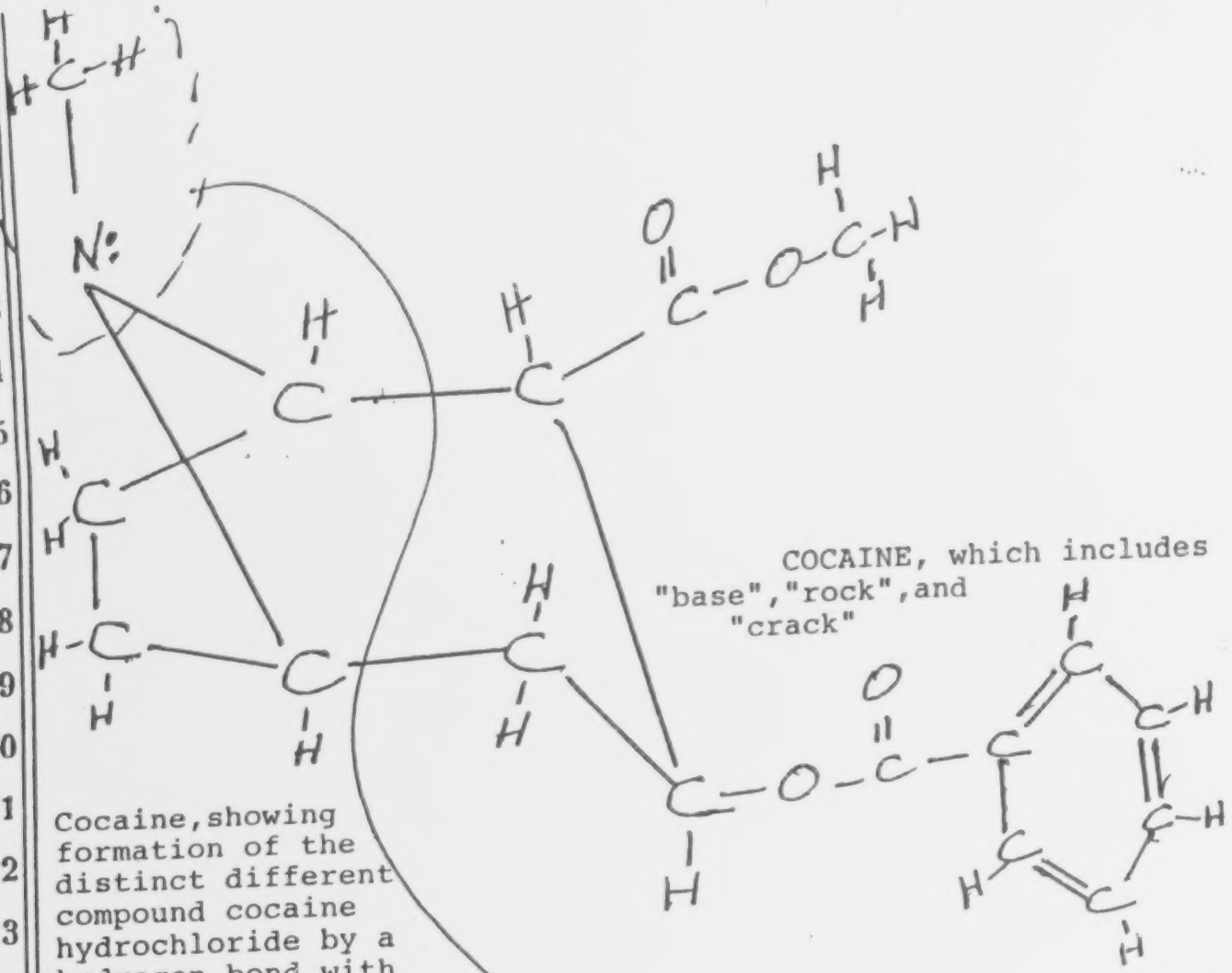
METHAMPHETAMINE HYDROCHLORIDE

$C_{10}H_{16}NCl$

water soluble solid at room temperature

molecular weight 185.7

melting point 170-175°C



COCAINE, which includes "base","rock",and "crack"

Cocaine,showing formation of the distinct different compound cocaine hydrochloride by a hydrogen bond with hydrochloric acid at the situs of electronegativity on the Nitrogen atom. Nitrogen, with 5 electrons in its outer orbit, uses three to form bonds, leaving 2 exposed to attract the positive hydrogen nucleus, which has no orbiting electrons on its side opposite to the bond with the chloride atom.

COCAINE

$C_{17}H_{21}NO_4$

Mol. Wgt. 303.35
Not Water Soluble
Melting Point 98°C

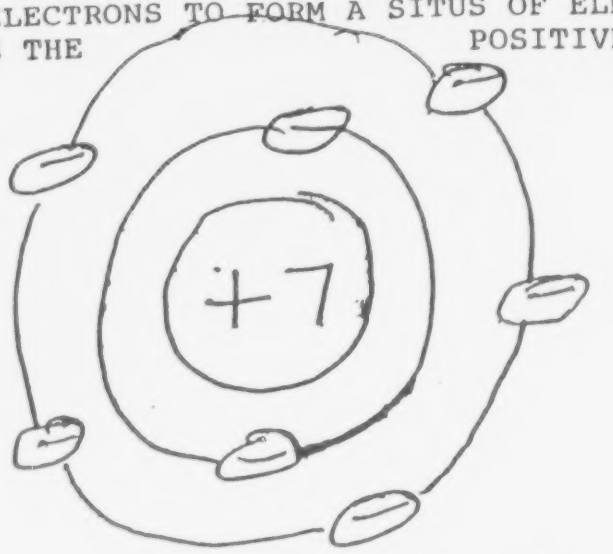
COCAINE HYDROCHLORIDE

$C_{17}H_{22}ClNO_4$

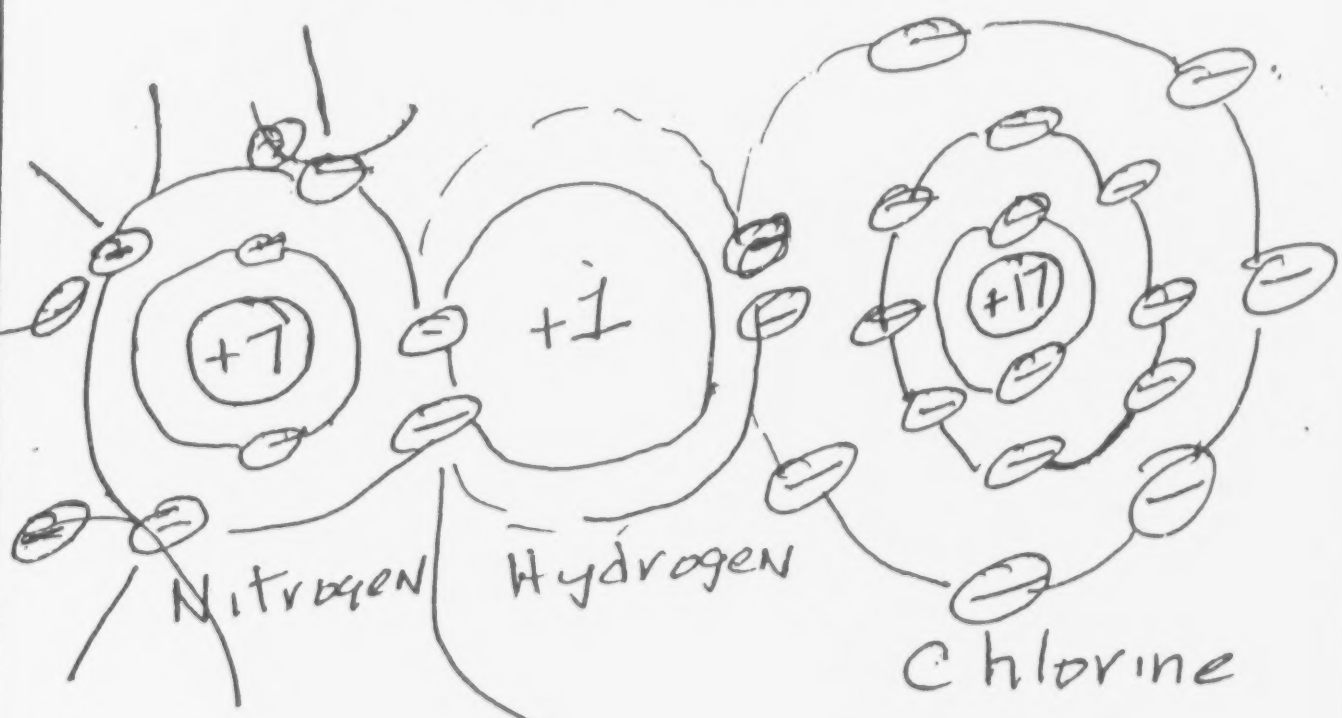
Mol. Wgt. 339.81
Water Soluble
Melts 195°C

BEST AVAILABLE COPY

THE ATOM NITROGEN, WITH TWO ELECTRONS IN ITS INNER SHELL AND FIVE ELECTRONS IN ITS OUTER SHELL--THREE FORM BONDS LEAVING 2 ORBITING ELECTRONS TO FORM A SITUS OF ELECTRONEGATIVITY THAT ATTRACTS THE POSITIVE HYDROGEN NUCLEUS.



Nitrogen, 5 electrons outer orbit.
3 form bonds, 2 exposed to allow "hydrogen bond" to form with HCl



THE HYDROGEN BOND FORMED WITH THE ELECTRONEGATIVE ATOM NITROGEN. Note that no electrons orbit on the side opposite to the situs of bonding with the chlorine atom.

Electrostatic/Ionic
Nitrogen-Hydrogen Bond
To Form New Compound

THE MERCK INDEX

AN ENCYCLOPEDIA OF
CHEMICALS AND DRUGS

NINTH EDITION

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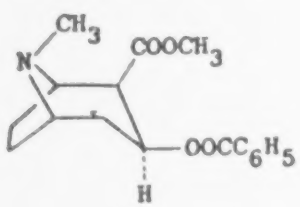
1976

2408. Cocaine. ***[1R-(exo,exo)]-3-(Benzoyloxy)-8-methyl-8-azabicyclo[3.2.1]octane-2-carboxylic acid methyl ester; 3β-hydroxy-1aH,5aH-tropane-2β-carboxylic acid methyl ester benzoate;*** 2β-carbomethoxy-3β-benzoxytropane; ecgonine methyl ester benzoate; *l*-cocaine; β-cocaine; benzoylmethylecgonine. $C_{17}H_{21}NO_4$; mol wt 303.35. C 67.31%, H 6.98%, N 4.62%, O 21.10%. From the leaves of *Erythroxylon coca* Lam. and other species of *Erythroxylon, Erythroxylaceae* or by synthesis. Extraction procedure: Squibb, *Pharm. J.* [3] **15,** 775, 796; **16,** 67 (1885); Emde in *Ullmann's Enzyklopädie der Technischen Chemie;* Schwyzer, *Die Fabrikation pharmazeutischer und chemisch-technischer Produkte* (Berlin, 1931). Synthesis: Willstätter *et al., Ann.* **434,** 111 (1923). Configuration: Findlay, *J. Am. Chem. Soc.* **76,** 2855 (1954).



Monoclinic tablets from alcohol, mp 98°. Volatile, esp above 90°, but the sublimate is not crystalline. $bp_{0.1}$ 187-188°. $[\alpha]^{18}_D$ - 35° (50% alcohol); $[\alpha]^{20}_D$ - 16° (c = 4 in chloroform). Aqueous solns are alkaline to litmus. pK at 15° = 5.59; K = 2.6 X 10^{-6}. Absorption spectrum: Dobbie, Fox, *J. Chem. Soc.* **103,** 1194 (1913); Fischer, *Arch. Exp. Pathol. Pharmakol.* **170,** 610 (1933). One gram dissolves in 600 ml water, 270 ml water at 80°, 6.5 ml alcohol, 0.7 ml choloroform, 3.5 ml ether, 12 ml oil turpentine, 12 ml olive oil, 30-50 ml liquid petrolatum; also sol in acetone, ethyl acetate, carbon disulfide. LD_{50} i.v. in rats: 17.5 mg/kg.

Caution: Abuse leads to habituation or addiction.

USE: The free base is used for ointments and oily solns because of its soly in fats; otherwise the hydrochloride or the sulfate is preferred.

THERAP CAT: Topical anesthetic (narcotic).

THERAP CAT (VET): *See* Cocaine Hydrochloride.

2409. Cocaine Hydrochloride. Cocaine muriate. $C_{17}H_{22}$-$ClNO_4$; mol wt 330.81. C 60.08%, H 6.53%, Cl 10.43%, N 4.12%, O 18.83%.

Crystals, granules, or powder; saline, slightly bitter taste; numbs tongue and lips. mp at 195°. $[\alpha]_D$ - 72° (c = 2 in aq soln pH 4.5). One gram dissolves in 0.4 ml. water; 3.2 ml cold, 2 ml hot alcohol; 12.5 ml chloroform. Also sol in glycerol, acetone. Insol in ether or oils. Avoid heat in preparing soln as it decomposes. Preserve in well-closed, light-resistant containers.

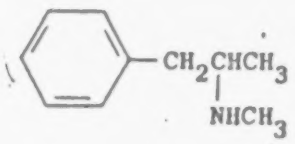
Incompat. Calomel, mercuric oxide, silver nitrate, precipitants of alkaloids in general.

Caution: Abuse leads to habituation or addiction.

THERAP CAT: Topical anesthetic.

THERAP CAT (VET): Local anesthetic and CNS stimulant; now used almost exclusively for local anesthesia of the eye.

5805. Methamphetamine. ***(S)-N,a-Dimethylbenzeneeth-anamine; d-N,a-dimethylphenethylamine;*** *d-N*-methylam-phetamine; *d*-deoxyephedrine; *d*-desoxyephedrine; 1-phenyl-2-methylaminopropane; *d*-phenylisopropylmethylamine; methyl-β-phenylisopropylamine; Norodin. $C_{10}H_{15}N$; mol wt 149.25. C 80.48%, H 10.13%, N 9.39%. Can be prepd by reducing ephedrine or pseudoephedrine: Emde, *Helv. Chim. Acta* **12,** 365 (1929). Prepn by reducing the condensation product of benzyl methyl ketone and methylamine: Ogata, *J. Pharm. Soc. Japan* **451,** 751 (1919). Stereochemistry-pharmacology aspects: Patil *et al., J. Pharmacol. Exp. Ther.* **155,** 1, 13 (1967).



Hydrochloride, $C_{10}H_{16}ClN$, *"speed", "meth", Adipex, Amphedroxyn, Desfedrin, Desoxyfed, Desoxyn, Destim, Dexoval, D-O-E, Doxephrin, Drinalfa, Efroxine, Gerobit, Giropon, Isophen, Madrine, Methedrine, Methylisomyn, Pervitin, Semoxydrine, Soxysympamine, Syndrox, Tonedron.* Crystals, mp 170-175°. Bitter taste. $[\alpha]^{25}_{D}$ + 14 to + 20°. Sol in water, alcohol, chloroform. Practically insol in

ether. A 1% aq soln is neutral or slightly acid to litmus. LD_{50} i.p. in mice: 70 mg/kg.

Caution: Excessive use may lead to tolerance and physical dependence.

THERAP CAT: Central stimulant.

THERAP CAT (VET): Sympathomimetic, CNS stimulant.